



U.S. Department
Of Transportation
**Federal Highway
Administration**

Memorandum

Subject: Section 4(f) - Constructive Use

Date: NOV 12 1935

From: Director, Office of Environmental Policy
Washington, D.C. 20590

Reply to
Attn. of: HEV-11

To: Regional Federal Highway Administrators
Regions 1-10, and Direct Federal Program Administrator

Concern has been expressed from several State highway agencies and from several Federal Highway Administration (FHWA) offices about the results of litigation on constructive use of Section 4(f) lands. The two most notable cases are I-CARE in Fort Worth, Texas, and H-3 in Hawaii.

While each of these decisions represented major setbacks for the respective projects and may present formidable obstacles from the standpoint of nationwide precedent, we believe that FHWA can construct a defensible position on the proper application of the constructive use doctrine on future projects.

The first step in the defense is a recognition that a constructive use can occur. The second step is to establish a threshold or standard for determining when the constructive use occurs. The FHWA has determined that the threshold for constructive use is proximity impacts which substantially impair the function of a park, recreation area, or waterfowl or wildlife refuge, or substantially impair the historic integrity of a historic site.

Steps 3, 4, and 5 are project specific and should be applied whenever there is a likelihood that constructive use could occur or will be an issue on a project. The third step is to identify the functions, activities, and qualities of the Section 4(f) resource which may be sensitive to proximity impacts. The fourth step is to analyze the proximity impacts on the Section 4(f) resource. Impacts (such as noise, water runoff, etc.) which can be quantified, should be quantified. Other proximity impacts (such as visual intrusion) which lend themselves to qualitative analysis should be qualified. The fifth step is to determine whether these impacts substantially impair the function of the Section 4(f) resource or the historic integrity of a historic site. This determination on impairment should, of course, be coordinated with the public agency which owns the park, recreation area, or refuge, or with the State Historic Preservation Officer in the case of historic sites.

If it is concluded that the proximity effects do not cause a substantial impairment, the FHWA can reasonably conclude that there is no constructive use. Project documents should, of course, contain the analysis of proximity effects and whether there is substantial impairment to a Section 4(f) resource. Except for responding to review comments in environmental documents which specifically address constructive use, the term "constructive use" need not be used. Where it is decided that there will be a constructive use, the draft Section 4(f) evaluation must be cleared with the Washington Headquarters prior to circulation.

Ali F. Sevin

OCT 19 1980

MEMORANDUM OF UNDERSTANDING BETWEEN THE FEDERAL HIGHWAY ADMINISTRATION
AND THE HERITAGE CONSERVATION AND RECREATION SERVICE CONCERNING EMERGENCY
PROCEDURES APPLICABLE TO UNANTICIPATED CULTURAL RESOURCES DISCOVERED
DURING CONSTRUCTION OF FEDERAL-AID HIGHWAYS

WHEREAS, the United States Department of Transportation, Federal Highway Administration (FHWA), is authorized and directed by Congress to implement the Federal-aid highway program (Title 23, U.S.C.); and

WHEREAS, a delay to the project could unnecessarily disrupt a construction schedule and be costly; and

WHEREAS, representatives of the FHWA, the National Conference of State Historic Preservation Officers, the Heritage Conservation and Recreation Service (HCRS), and the Advisory Council on Historic Preservation (ACHP) have met to consider FHWA responsibilities when such emergency conditions exist; and

WHEREAS, these parties agree that a special procedure is necessary and appropriate to allow expeditious consideration of such resources and meet the requirements of 36 CFR, Part 800.7;

THEREFORE, it is mutually agreed that the stipulations in this Memorandum of Understanding provide an expeditious alternate method for consideration of cultural resources which are discovered after construction has started.


STIPULATIONS

- I. When a Federal-aid highway construction project uncovers a cultural resource that may be eligible for the National Register, the expeditious process detailed in Stipulation II may be adopted if the following has been accomplished:
 - A. A cultural resource survey performed according to the requirements of 36 CFR, Part 800.4(a), was completed prior to project approval and the discovered resource was not identified during such survey.
 - B. The process detailed in the ACHP regulations (36 CFR, Part 800) was completed prior to the start of construction.
 - C. The construction contract directs the contractor to be on the lookout for cultural resources and to avoid damage to such discovered resources until the provisions of Stipulation II are complied with.

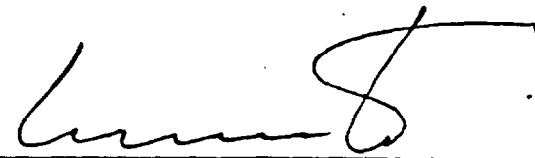
- II. Whenever anything that might be a cultural resource is discovered during construction, work will avoid the area of the discovery and the contractor shall notify the State highway agency (SHA) immediately. If warranted, the SHA will contact and inform the State Historic Preservation Officer (SHPO) and FHWA of the discovery and arrange an onsite meeting of appropriate parties if either FHWA or the SHPO believes it necessary. If it is determined that a meeting will be held, the following actions will be taken:
- A. The FHWA will notify the HCRS, Division of Interagency Archeological Services (IAS), Department of the Interior (DOI), by telephone with followup written notification that it appears that significant archeological or historical data contained in a cultural resource have been uncovered on a particular project.
 - B. Within 48 hours of telephone notification, HCRS will send an authorized representative of the Secretary of the Interior (DOI representative) to examine the discovery.
 - C. Following examination and consultation with the SHPO, SHA, FHWA, and any local authorities deemed appropriate, one of the following recommendations will be made at the onsite meeting by the DOI representative. If the DOI representative does not attend the scheduled field review, FHWA may proceed with what it considers to be an appropriate course of action. The SHA and SHPO representatives may also make one of these recommendations if they so choose.
 1. The data discovered are significant and should be preserved in place; or
 2. The data discovered are significant and should be recovered; or
 3. The data discovered are significant but no additional data recovery need be undertaken; or
 4. The data discovered are not significant and no data recovery need be undertaken.
 5. There is insufficient information to determine if the data discovered are significant and the necessary steps to obtain the needed information to reach one of the definite conclusions stated above will be recommended.

- D. In consultation with the DOI representative, the SHPO, SHA, and appropriate local authorities, FHWA will decide the appropriate course of action in proceeding with the project. When data recovery is the appropriate option, the onsite meeting will determine what steps should be taken to recover the significant data, including development of data recovery plan.

- III. This understanding may be terminated by any of the signatories upon a 60-day notification to all other signatories.

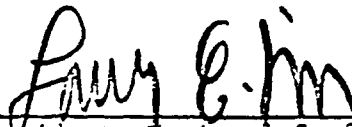

 Administrator, Federal Highway
 Administration

SEP 23 1980
 Date


 Director, Heritage Conservation
 Recreation Service

10.1.80
 Date

Concurring Party


 President, National Conference
 of State Historic Preservation
 Officers

10/28/80
 Date

Differences Between the FHWA and DOI Positions

Constructive Use

The Department of the Interior (DOI) stated they might consider the following as examples of constructive use: (1) where the proximity of a highway alters a habitat area in a wildlife refuge or interferes with the normal behavior of wildlife populations; (2) where a highway reduces the current level of access to a park or recreation area; and (3) where a highway changes the character of the view from a historic district that is incompatible with the historic nature of the district. The DOI's description of the threshold for constructive use of Section 4(f) resources contains terms such as alters, interferes, reduces and changes. We agree that these types of impacts where they are sufficiently severe to substantially impair the resource would be a constructive use. However, standing alone, the Federal Highway Administration (FHWA) views these terms as establishing a lower threshold than those generally found in case law. A number of court decisions, including Adler v. Lewis, 675 F.2d 1085 (9th Cir. 1982) (copy enclosed), have established "substantial impairment" as the threshold for constructive use.

Wild and Scenic Rivers - The DOI stated that (1) all rivers now in the National Wild and Scenic Rivers System have been designated because of recreational and park (conservation, etc.) values, (2) all publicly owned lands within those boundaries are used for Section 4(f) purposes, (3) the management plans will show that the primary use is, in accord with the Wild and Scenic Rivers Act, for one or more Section 4(f) purposes, and (4) the officials having jurisdiction will, in all cases, certify that this is so if asked. The FHWA does not necessarily base application of Section 4(f) on title or systems designation. Instead, FHWA bases Section 4(f) application on actual function. If portions of the publicly owned lands designated only for conservation values are recreational areas subject to Section 4(f).

Wildlife Management Areas (WMA) - The DOI stated that Federal WMAs are part of the National Wildlife Refuge System and therefore are considered to be a refuge within the meaning of Section 4(f). We have revised the discussion on wildlife management areas to state that such areas would be protected by Section 4(f) where they perform the same functions as a refuge, i.e. protection of species. As explained in answer 2A we would, of course, rely heavily on the views of the officials having jurisdiction over these areas in determining their function.

Historic Sites - The DOI wants to afford Section 4(f) protection to historic sites even if they are not on or eligible for the National Register of Historic Places. Obviously we cannot afford Section 4(f) protection to every site which is claimed historic by any individual. It has been a longstanding DOT Policy to apply Section 4(f) to all sites on or eligible for the National Register. In addition, our environmental regulation and this policy paper extend Section 4(f) protection to the historic sites based on an individual site-by-site review.

Archeological Sites - The DOI wants to afford Section 4(f) protection to archeological sites even if they are important chiefly because of what can be learned by data recovery and have minimal value for preservation in place. This position is contrary to our regulation which was upheld in the Belmont case (Town of Belmont v. Dole, 755 F.2d 28 (1st Cir., 1985)).